

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT TABORA

MISC. CIVIL APPLICATION NO. 28 OF 2020

(Originating from Juvenile Court of Tabora at Tabora in Misc. Civil Application No. 21/2019)

HILDA HAULE.....APPLICANT

VERSUS

RAMADHAN HASSAN MAJALIWA.....RESPONDENT

RULING

Date: 15/2/2022-04/3/2022

BAHATI SALEMA, J.:

The applicant herein, Hilda Haule filed this application under Section 130(2) of the Law of the Child Act, Cap. 13 [R.E. 2019], where the applicant prays that;

- 1. This court be pleased to extend the time for filing an appeal out of time against the ruling and order in Misc. Civil Application No. 21 of 2019 in the Juvenile Court of Tabora at Tabora;*
- 2. Any other relief this Court may deem fit and just;*
- 3. Costs may be ordered to be in the cause.*

When the application was called for hearing, the applicant was represented by Mr. Sycone Justice, learned counsel whereas the respondent was represented by Ms. Flavia Francis learned counsel. With the permission of the court, the application was disposed of by way of written submissions.

Submitting in support of the applicant, he submitted that an application for enlargement of time is entirely the discretion of this court and the same is exercised judiciously as articulated in the cases of **Mumello Vs. Bank of Tanzania [2006] TLR 227** as well as in **Kalunga and Company Advocates Vs. National Bank of Commerce [2006] TLR 235**.

In the exercise of its direction, the court has to consider whether or not a good cause has been shown by the applicant, as stipulated under Section 130 (2) of the Law of the Child Act, Cap. 13 [R.E. 2019], which states that;

"The High Court may for good cause admit an appeal out of time".

He submitted that from paragraphs 10 to 17 of the applicant's affidavit, he has demonstrated the reasons for the delay and an arguable case on appeal and also submitted that the issue of illegality is a good ground for extension of time.

In his submission, he addressed only two issues of illegality, which are stated under paragraph 14 of the applicant's affidavit. First, Martha Reuben, the child, was never afforded the right to be heard and her best interests were not taken into account while determining her fate. Second, the non-joinder of necessary parties in the said proceedings made the nullity of the proceedings as no effective judgment would be entered by the court in the absence of necessary parties.

Submitting on the first issue of illegality that a child (Martha Reuben), was denied the right to be heard and that this was a violation of the principle of best interests of the child. There was no point in time when the child, Martha Reuben, who was 15 years old at the time the dispute arose, was ever called in court to avail herself of her right to be heard. She was taken by the respondent without her will but in compliance with the court's order without considering her best interest and in denial of her right to be heard.

To bolster his argument, in terms of section 39 (2) of the Law of the Child Act, Cap 13 [R.E. 2019], which provides that in granting or deciding in whose custody the child should be placed, the court shall consider the best interest of the child or the principle of the welfare of the child, and in particular, the view of the child.

"Subject to subsection (1), the court shall also consider: (a) the rights of the child under section 26, (b) the age and sex of the child, that it is preferable for a child to be with his parents except if his right is persistently being abused by his parents; (c) the views of the child if the view has been independently given; (d) that it is desirable to keep siblings together; (e) the need for continuity in the care and control of the child and any other matter that the court may consider relevant".

He also referred this court to the case of **Mariam Tumbo vs. Harold Tumbo** [1983] TLR 293, where the court held that;

"In matters of custody, the welfare of the infant is of paramount consideration, but where the infant is of an age to express an independent opinion, the court is obliged to have regard to his or her wishes."

Since the child (Martha Reuben) was 15 years old at the time of the case, her wishes or opinions would have been procured before the determination of the custody order, the failure of which renders the custody order nugatory. In the case of **Mbeya Rukwa Autoparts and Transport LTD Vs. Jestina Mwakyoma** [2003] TLR 251, the court held that:

"In this country, natural justice is not a mere principle of common law, it has become a fundamental constitutional right under Article 13 (6) (a) of the Constitution of the United Republic of Tanzania. Thus any decision reached in contravention of the principle of natural justice is nullity. "

He submitted that since the decision of the trial court was reached in contravention of the right to be heard, the best interests of the child were not taken into account at all. The indicated illegalities entitle the applicant to be allowed to file an appeal out the time for this court to rectify these illegalities envisaged in the trial court's proceedings.

With regard to the second fold of illegality, which is the non-joinder of a necessary party. He submitted that failure to join the purported mother of the child, Mwasiti Athuman and the Roman Catholic Archdiocese of Tabora who gave the said child to the applicant to take care of was fatal. Under no circumstance would the court pass an affective judgment and decree or ruling and order without first joining the mother of the child, who, according to the respondent, knows her whereabouts. She is the one who was in the best position to explain with certainty the father of the child, Martha Reuben. The aspect of non-joinder of the part to entail an omission to join some of the necessity ought to have been joined. It is a trite law that non-joinder of

the necessary party is fatal. Hence, it suffices to make the decision reached by the trial illegal for want of joinder of the necessary party. In the case of Juma B. Kadala Vs. Laurent Nkande [1983] TLR 42, the court held that non-joinder of the necessary party is fatal and may vitiate the proceedings.

Hence, the two illegalities indicated above, which are the denial of the right to be heard, which led to the non-consideration of the best interest of the child, and non-joinder of necessary parties, are sufficient reasons for an extension of time. In the case of **Hamisi Mohamed (as administrator of the estate of the late Risasi Ngawe Vs. Mtumwa Moshi (as administratrix of the later Moshi Abdallah)**, Civil Application No, 407/17 Of 2019, Court of Appeal of Tanzania at Dar es Salaam (Unreported) at page 9. The court stated that;

"It is, therefore, settled law that a claim of the illegality of the challenged decision constitutes a sufficient reason for an extension of time regardless of whether or not a reasonable explanation has been given by the applicant under the rule to account for the delay."

From the foregoing, he prayed to be granted the prayer of extension of time with costs.

Responding, the counsel for the respondent, Ms. Flavia Francis submitted that the applicant, in her submission, did not file the appeal on time since the decision was delivered on February 19, 2020 and the application was filed before this court on 8th December 2020 meaning after 10 months had passed since the ruling was delivered. As a matter of law, the applicant has to count down all days of delay. To bolster her stance in the case of Safari Petro versus Boay Tlem, Civil Application No. 320/17 of 2017, the Court of Appeal of Tanzania at Arusha, page 5, held that;

"The position of the law is that where there has been a delay in doing any act in compliance with the requirement of law, each day of the delay has to be accounted for."

Submitting further on illegality, she stated that there was no illegality in the ruling or proceedings of Misc. Civil Application No. 21/2019 which was before the Juvenile Court at Tabora. The case was heard by taking into account and considering the best interests of the child. The child was living with the applicant, who was the foster mother of the child, Martha Reuben and the respondent, who is the biological father of the said child, the court considered the child's best interests before granting custody.

She further disputed the allegation that the child did not have the right to be heard. She cited Section 39 of the Law of the Child Act, Cap. 13 [R.E. 2019] which needs the view of the child. As there was a **social welfare** officer, Mr. Nehemia Stephen, he did the needful by taking the view of the child, even the view of the parties. He went to Mwanza, where the respondent was living, and to the applicant's place at Tabora and at Nyamwezi secondary school, where the child was studying, and all these efforts were for the purposes of finding out the best interest of the child. He made a report which was used by the Magistrate to come up with the right decision. In this matter, the child had been given an independent opinion, so there was no illegality.

She also disputed the alleged illegality of the non-joinder of the necessary party means, Mwasiti Athumani and Romani Catholic Archdiocese of Tabora, because illegality must be found in the proceedings or the judgment/ruling. On page 10:1 of the proceedings, there is no relation between this matter and Roman Catholic to be joined as a necessary party, as Roman Catholic was not involved in any way with the child, but rather the Padre/reverend acted in his personal capacity and not under the umbrella of the Roman Catholic Archdiocese of Tabora. That is why even in the mediation process which was conducted at Igunga at his place and therefore, the Roman

Catholic Archdiocese of Tabora is nowhere in the record shows that it was to be a party to the case, nor any evidence adduced over the same. On the issue of Mwasiti Athuman, the mother of the child, being joined, there is no illegality in that, because the non-joining of the mother of the child, did not occasion a miscarriage of justice for anybody, and nobody has been injured. This is because the biological mother abandoned the child, and the record is silent as to her whereabouts.

She submitted that the applicant has never stated reasons for the delay instead of the alleged illegality. She further submitted that the court had to take into account that the applicant needed to disturb the child who by now lives at peace with her parent, who is the respondent while knowing the law is clear that the child has to live with her/his parents, which the court did so by ruling out that the child had to live with the respondent. She prayed to this court to dismiss the application with costs.

Having heard from both submissions, the issue is whether the application has merit.

In determining the instant application, I wish to reiterate the well-founded principles of the law on the application for an extension of time. Granting an extension of time rests at the discretion of the Court. However, for the court to grant an extension of time, the applicant

must advance sufficient cause or good reason for the delay, and if the court feels that there are other reasons, such as the existence of a point of law of sufficient importance, such as the illegality of the decision sought to be challenged. See the cases of **Lyamuya Construction Company LTD and Board of Trustees of the 4 Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported).

The Law of the Child Act, Cap.13 [R.E 2019] under section 130 (1) provides that;

" Every appeal against an order or sentence made or passed by a juvenile court under the provisions of this Act shall be entered within 14 days from the date of the order or sentence appealed against."

(2) The High Court may for good cause admit an appeal out of time.

The records at hand show that the ruling was delivered on 19th February 2020 and the application was filed in this court 8th December,2020.

Even if this court would exclude the time from September 2020 when she received a copy of the proceedings, she still delayed filing until December, 2020 and the applicant has not shown sufficient grounds as

to what delayed her from making this application. Thus, this ground fails.

On the issues regarding illegality in the ruling of the Juvenile Court. As it is already a settled principle of the law that a claim of illegality amounts to sufficient cause for the delay, as it was established in the case of VIP Engineering and Marketing Limited v. Citibank (T) Ltd, Consolidated Civil Reference Nos. 6, 7 and 8 of 2006, Court of Appeal.

In the instant application, it was alleged that the applicant was denied the right to be heard in violation of the principle of the best interest of the child. Having perused through the court records, I have noted that since this case was heard by taking into account and consideration of the best interests of the child, which means the child was living with the "applicant" who is the foster mother of the child, Martha Reuben, and the respondent, who is the biological father of the said child, the court considered the child's best interests before granting the said custody. As also revealed in the reply, there was a **social welfare** officer, Nehemia Stephen, who did the needful by taking the child's view, even the view of the parties. I have not been persuaded by what is before the court on the alleged illegality in the trial court's decision.

In respect of non-joinder of necessary parties, Mwasiti Athumani and Romani Catholic Archdiocese of Tabora, I subscribe to the respondents'

submission that there is no relationship between this matter and Roman Catholic Archdiocese of Tabora to be joined as a necessary party because Roman Catholic Archdiocese of Tabora was not involved in any way with the child.

I must conclude that, under the circumstances pertaining to this application, the applicant has failed to bring forward good cause that would entitle her to the extension of time sought.

It is, however, significant to note that the issue of consideration of illegality when determining whether or not to extend time is well settled, and it should be borne in mind that, in those cases where an extension of time was granted upon being satisfied that there was illegality, the illegalities were explained. In *Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia* [1999] TLR 182,

"The illegality alleged related to the applicant's being denied an opportunity to be heard, contrary to the rules of natural justice."
We also subscribe to the views expressed by the Court in the case of Lyamuya Construction Company Ltd vs Board of Registered Trustees of Young Women's Christian Association of Tanzania, when the Court observed;

"Since every party intending to appeal seeks to challenge a decision either on points of law or facts, it cannot, in my view, be said that in VALAMBIA'S case, the court meant to draw a general rule that every applicant who demonstrates that his intended appeal raises points of law should, as of right, be granted an extension of time if he applies for one."

The Court in the above case emphasized that such a point of law must be one of importance and, I would add, it must also be apparent on the face of the record, such as the question of jurisdiction; not one that would be discovered by a long drawn argument or process.

Applying for the above position under consideration, this application has no merit and is consequently dismissed with costs.

Order accordingly.




BAHATI SALEMA

JUDGE

4/3/2022

Ruling delivered under my hand and seal of the court in the Chamber, this 4th day of March, 2022 in the presence of both parties.

A. Bahati

A. BAHATI SALEMA

JUDGE

04/03/2022

Right to appeal is hereby explained.

A. Bahati

A. BAHATI SALEMA

JUDGE

04/03/2022

